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In the

Supreme Court of the United States

OCTOBER TERM, 1949

A. L. WILLIS, ET AL. ..... *Petitioners*

Vs.

BARNSDALL OIL COMPANY, ET AL. ..... *Respondents*

No. 246

PETITION FOR WRIT OF CERTIORARI

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Come now A. L. Willis, Adrian W. Willis, A. L. Willis, Jr., Ava Lee Stuart, H. O. Stuart and A. T. Brown, hereinafter styled petitioners, and applying for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, respectfully shows:

STATEMENT OF FACTS

This suit was filed by Barnsdall Oil Company and Standard Oil Company, an Ohio corporation, as plaintiffs, against A. L. Willis, A. T. Brown, R. O. Davis, The Texarkana National Bank, and Guaranty Bond State Bank of Redwater, Texas, as defendants, on December 13, 1943. The original complaint appears on pages 1 to 8, inclusive, of the record. On January 19, 1944, plaintiffs filed their Second Amended Complaint,

making Barnsdall Oil Company, Standard Oil Company, an Ohio corporation, and J. K. Wadley plaintiffs, and A. L. Willis, Adrian W. Willis, A. L. Willis, Jr., Ava Lee Stuart, H. O. Stuart, A. T. Brown, R. O. Davis, and The Texarkana National Bank defendants (R. 8-15), and alleging as a cause of action that the plaintiffs, in 1943, were assembling a block of leases in what is known as the Eylau area in Bowie County, Texas, and that the said J. K. Wadley employed the defendant, A. L. Willis, as agent of plaintiffs, to buy oil and gas leases, and that the said A. L. Willis from time to time obtained confidential information of plaintiffs, from which the said A. L. Willis knew that plaintiffs desired to acquire a lease upon the Heilbron tract, which was particularly described by metes and bounds, as a part of the lease block, and that the defendant, A. L. Willis, taking advantage of such confidential information, acquired the Heilbron lease for himself, taking the same in the name of one A. T. Brown, and that thereafter, the said defendant, A. L. Willis, assigned the Heilbron lease to the plaintiff, J. K. Wadley, for $7,500.00 cash, and an overriding royalty of one-fourth of seven-eighths, and that the plaintiffs paid A. L. Willis a commission of $500.00 for procuring this assignment from Brown. Plaintiff further alleged that by reason of the breach of trust on the part of A. L. Willis, they were entitled to recover the $7,500.00 paid for the assignment, and the $500.00

commission, less $291.00 paid by Willis to Heilbron for the lease, and were also entitled to have impressed upon the overriding royalty a constructive trust, alleging that A. L. Willis was acting as trustee for the plaintiffs at the time he purchased the lease from Heilbron.

These issues were joined by the answers of the various defendants, and particularly the answer of the defendant, A. L. Willis (R. 18-24). Among the special defenses pleaded by the defendant, A. L. Willis, were waiver and ratification by reason of the fact that the plaintiffs, with full knowledge of all of the facts alleged in their complaint, accepted the assignment, recorded the same, and held the same, claiming to be the owners of said leasehold interest, and that the plaintiffs proceeded to make use of the properties for which the lease was originally executed and delivered by drilling for oil and gas upon said land, and that they never repudiated the original lease nor the transfers and assignments thereof, and that by reason of such facts, the plaintiffs elected to stand upon the lease from Heilbron and upon the assignment from A. T. Brown, and confirmed and ratified the representations, acts and conduct of A. L. Willis, and waived any right or rights which they might have had to repudiate said lease (R. 24).

This cause was first tried in the United States District Court for the Eastern District of Texas, and judgment

entered on the 13th day of November, 1944, in favor of the defendants. The judgment was appealed from by the plaintiffs to the Honorable United States Court of Appeals for the Fifth Circuit, and that Court, on January 12, 1946, reversed said cause and remanded the same to the United States District Court, Eastern District of Texas, for a new trial (152 F. (2d) 824).

The cause was thereafter tried in the United States District Court for the Eastern District of Texas, and after hearing of said cause, the said United States District Court made certain findings of fact relative to the question of the plaintiffs having waived and ratified any alleged fraud on the part of the petitioner, A. L. Willis, which findings were as follows:

> "At the time the misconduct of Willis was discovered, plaintiffs had expended large sums of money in the exploration of the Eylau block and in the drilling of one well and was preparing to drill a second well on the Heilbron lease. In these circumstances, it is inequitable to require plaintiffs to tender back the lease to the defendant Willis before bringing this action, and in view of these facts, they were not required to tender back the lease.
>
> "None of the plaintiffs intended to, or, in fact, did waive or relinquish any right to recover against the defendants by reason of the actions or statements of the plaintiff's, Barnsdall Oil Company's, tax commissioner with respect to the assessment of taxes on the Heilbron lease" (R. 49, Supp. R. 4).

The trial court also stated its conclusions of law based upon the above findings of fact, as follows:

> "As a matter of law, plaintiffs were not required to tender back the lease, because this is an action to impress a constructive trust upon profits realized by an unfaithful agent through a breach of trust.
>
> "As a matter of law, plaintiffs did not ratify the misconduct of Willis by failure to tender back the lease at the time such misconduct was discovered, and did not waive their right of action by failing to tender back the lease, and the failure of plaintiffs to tender back the lease does not act as an estoppel against the plaintiffs.
>
> "As a matter of law, plaintiffs did not waive their right of action by reason of the conduct of Barnsdall Oil Company's tax commissioner with respect to the assessment of taxes on the Heilbron lease, nor or plaintiffs in any wise estopped by reason of any act or conduct of said tax commissioner" (Supp. R. 6-7).

The petitioners herein requested the trial court to make the following findings of fact:

> "The Court finds as a fact that the conduct of the defendant, A. L. Willis, complained of by the plaintiffs in this cause, was discovered by the plaintiffs in December, 1943, and that on said date, or immediately thereafter, the plaintiffs, and particularly the plaintiff, Barnsdall Oil Company, was fully apprised of the actions of the defendant, A. L. Willis; and thereafter, on the 13th day of December, 1943, the plaintiffs instituted this cause, complaining of the conduct of the defendant, A. L. Willis; that while said cause was pending, Mr. Charles Gillespie,

Tax Commissioner for Barnsdall Oil Company, on the 30th day of April, 1947, wrote a letter to the Tax Assessor and Collector of Bowie County, Texas, enclosing therewith a rendition of the taxable properties of Barnsdall Oil Company in Bowie County, Texas, among which properties was listed the Louis Heilbron lease on the 97 acres of land in the M. H. Janes Headright Survey, equipment and well, which was rendered at $1,500.00. Also rendered under the same property number was 'Daily Ave. gross production on January 1, 1947—41.3 bbls. Daily ave. Barnsdall Int. .65.625 on Jan. 1, 1947—27.1 bbls. @ $200.00.' That the interest of 65.625 rendered by the Tax Commissioner for Barnsdall Oil Company was 21.875 less the total working interest of 87.5; that thereafter, Mr. Gillespie appeared in person in the office of the Tax Assessor and Collector of Bowie County, Texas, and made pencil notations on the rendition sheet of Barnsdall Oil Company, showing that the interest of 21.875 should be assessed to the defendant, A. L. Willis, as the Willis overriding interest, and that Mr. Gillespie explained, by such notations, that Barnsdall Oil Company should only be assessed 65.825 of the total interest of 87.5, and that the remaining interest of 21.875 should be assessed against the defendant, A. L. Willis, as representing his overriding interest. That the Tax Assessor and Collector of Bowie County, Texas, made the assessments pursuant to the instructions of the Tax Commissioner of Barnsdall Oil Company, and that said taxes were paid by Barnsdall Oil Company and the defendant, A. L. Willis, in such proportions. The Court further finds that Mr. Charles Gillespie, Tax Commissioner for the Barnsdall Oil Company, was a duly authorized agent of the said Barnsdall Oil Company in transacting said matters with the Tax Collector of Bowie County, Texas, and that at the time the said Tax Commissioner was engaged in having the rendition of said property

changed by the Tax Collector of Bowie County, Texas, that the plaintiff, Barnsdall Oil Company, had full knowledge of all of the acts and conduct of the defendant, A. L. Willis, complained of in this cause. That the Barnsdall Oil Company received material benefit by reason of the actions of the Tax Commissioner, Charles Gillespie, in that their taxes were reduced, and that the taxes of the defendant, A. L. Willis, were increased.

"The Court finds as a fact that at the time the plaintiffs discovered the conduct and actions of the defendant, A. L. Willis, alleged to be fraud and a breach of trust, which discovery was made in the month of December, 1943, that the Barnsdall Oil Company was then in the process of drilling the first well on the lease in controversy, but that in the month of January, 1944, such well was abandoned as a dry hole, and that shortly thereafter, the plaintiffs began drilling a second well on said lease, which well was brought in as a producing well, and has been producing ever since. That prior to the time the first well was abandoned, and prior to the time the second well was begun, the plaintiffs had full knowledge of all of the acts and conduct on the part of the defendant, A. L. Willis, charged by the plaintiffs to be fraudulent, and which acts and conduct the plaintiffs complained of in the instant case; that the plaintiffs made no attempt, demand or request for a rescission or cancellation of the contract after discovering the alleged fraud and alleged misconduct of the defendant, A. L. Willis, but with full knowledge of said alleged fraud and alleged misconduct, began the drilling of a second well upon said lease. That prior to the beginning of the drilling of said second well, the plaintiffs did not tender back the lease to the defendant, A. L. Willis, nor offer to tender the same back, but continued to hold said lease in their name, and with full knowledge of the

alleged misconduct and fraud of the defendant, A. L. Willis, proceeded to drill the second well thereon. That said second well was brought in as a producing well, and has continued to produce since then. That the plaintiff, Barnsdall Oil Company, has continued to take oil and/or gas from said well, and that the plaintiffs have never tendered to the defendant, A. L. Willis, nor to any of the defendants, the lease in controversy, nor have they offered to tender said lease to the defendants" (R. 43-46).

Based upon the above findings of fact, the petitioners also requested the trial court to make the following conclusions of law:

"The Court concludes as a matter of law that the failure of the plaintiffs to tender back the lease, after the alleged misconduct on the part of the defendant, A. L. Willis, was discovered, and prior to the drilling of the second well, was a ratification of the alleged misconduct of the defendant, A. L. Willis.

"The Court concludes as a matter of law that the failure of the plaintiffs to tender back the lease to the defendant, A. L. Willis, after the discovery of his alleged misconduct, and prior to the drilling of the second well, amounted to a waiver of their right of action.

"The Court concludes as a matter of law that the conduct of Charles Gillespie, Tax Commissioner of the Barnsdall Oil Company, with respect to the assessment of taxes on the Heilbron lease, constituted a waiver of any right of action the plaintiffs might have had against the defendant, A. L. Willis.

"The Court concludes as a matter of law that by reason of the conduct of the Tax Commissioner of Barnsdall Oil Company with respect to the assess-

ment of taxes on the Heilbron lease, that the plaintiffs ratified any alleged misconduct on the part of the defendant, A. L. Willis.

"The Court concludes as a matter of law that the actions of the Barnsdall Oil Company in paying the taxes in the proportion as specified by their Tax Commissioner, ratified any alleged misconduct on the part of the defendant, A. L. Willis.

"The Court concludes as a matter of law that the Barnsdall Oil Company, in paying the taxes in the proportion as specified by their Tax Commissioner, constituted a waiver of any right of action that the plaintiffs might have had against the defendant, A. L. Willis" (R. 46-48).

The petitioners' requested findings of fact and conclusions of law above stated were refused, and the motion therefore denied (R. 50). On July 20, 1948, the United States District Court for the Eastern District of Texas, entered judgment in favor of respondents for the sum of $7,500.00, being the cash consideration paid by Barnsdall Oil Company to A. T. Brown for the Heilbron lease, plus $375.00 commission paid to A. L. Willis, less the sum of $291.00, being the sum of money actually paid by A. L. Willis to Louis Heilbron for said lease, and for recovery from the petitioners of the overriding royalty interest reserved in the assignment of the oil and gas lease from A. T. Brown to respondent, J. K. Wadley (R. 50-54).

This cause was duly appealed to the United States Court of Appeals for the Fifth Circuit, *and the only question or point presented to said Court was that respondents ratified and condoned all alleged fraud or misconduct on the part of the petitioner, A. L. Willis, and waived their cause of action against petitioners herein.* The Fifth Circuit Court of Appeals affirmed the judgment of the trial court by opinion May 6, 1949, the opinion being as follows:

> "PER CURIAM: The judgment is affirmed for the reasons set out by the District Judge in his opinion, reported in 78 F. Supp. 293. AFFIRMED."

Petitioners filed their motion for rehearing on May 26, 1949, and on May 30, 1949, the Honorable Fifth Circuit Court of Appeals denied the petition for rehearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, U.S.C.A. 347 (a) and Rule 38, Paragraph 5 (b), Rules of the Supreme Court of the United States, 1939, in that the Fifth Circuit Court of Appeals has decided an important question of local law in a way that conflicts with applicable local decisions. The following special and important question is presented:

QUESTION PRESENTED

Whether the respondents ratified and condoned all alleged fraud and misconduct on the part of petitioner, A. L. Willis, and waived their cause of action against petitioners herein.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The decision of the Fifth Circuit Court of Appeals which petitioners seek this Court to review involves an important question of local law, and the decision of the Fifth Circuit Court of Appeals is in conflict with applicable local decisions. *Rosenbaum, et al., vs. Texas Building and Mortgage Company, et al.* (Sup. Ct. Tex.), 167 S.W. (2d) 506; *Cator vs. Commonwealth Bonding & Casualty Insurance Company* (Sup. Ct. Tex.), 216 S.W. 140; *Couch vs. Sparger* (C.C.A.), 252 S.W. 817; *Southwestern Surety Insurance Company vs. Ferguson* (C.C. A.), 131 S.W. 662; *Duckels vs. Dougherty* (C.C.A.), 226 S.W. 720.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals, Fifth Circuit. commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and

complete transcript of the record and all proceedings in the case numbered 12,525, entitled on its docket A. L. Willis, et al., Appellants, vs. Barnsdall Oil Company, et al., Appellees, and that said judgment of said United States Court of Appeals, Fifth Circuit, be reversed by this Honorable Court, and that your petitioners have such other and further relief as the Court may deem proper.

Respectfully submitted,

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By Robert S. Vance
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ROBERT S. VANCE,
Of Counsel.

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SUPPORTING BRIEF

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The opinion of the United States Court of Appeals for the Fifth Circuit appears in the transcript of the record (R. 210).

Jurisdiction is invoked under Title 28, U.S.C.A. 347 (a) and Rule 38, Paragraph 5 (b), Rules of the Supreme Court of the United States, 1939. The opinion of the United States Court of Appeals for the Fifth Circuit was filed on the 6th day of May, A.D. 1949, and the petition for rehearing filed by your petitioners was overruled on May 30, 1949.

STATEMENT OF THE CASE

We herewith adopt the statement of the case as made in the foregoing petition for certiorari, with the following additional statement of the material evidence:

The alleged fraud which is made the basis of the relief sought by respondents in this cause was discovered by respondents in December, 1943, and they were fully aware of all of the alleged fraudulent acts of the petitioners herein at that time (R. 83).

Thereafter, on December 13, 1943, the respondents instituted their suit in the United States District Court for the Eastern District of Texas against the petitioners herein, alleging the fraud and breach of trust on the part of the petitioner, A. L. Willis (R. 8).

The evidence further shows that at the time the respondents discovered the alleged fraud and breach of trust on the part of the petitioner, A. L. Willis, respondents were then in the process of drilling a well on the disputed lease (R. 83); however, this well was a dry hole and abandoned in January, 1944, and thereafter respondents began the drilling of a second well, which was brought in as a producing well, and is still producing (R. 98). The evidence is further undisputed to the effect that after the first well was abandoned as a dry hole, and before the beginning of the drilling of the second well,

the respondents did not tender the assignment of the lease back to the petitioner, A. L. Willis, nor did they ask for a refund of the $7,500.00 consideration, and they had never tendered the assignment back, nor asked for a refund, and that the respondents were still in control of the producing well on the disputed lease (R. 98-99).

The evidence further establishes that one Charles Gillespie was in the Tax Department of the Barnsdall Oil Company, one of the respondents herein, and that his duties pertained to making tax returns and assessments in the states and counties and taxing units over the country where Barnsdall owned property (R. 137-138). The evidence further established that on April 30, 1947, W. N. McDuffie, Tax Assessor and Collector of Bowie County Texas, received a communication from Mr. Charles Gillespie, of the Barnsdall Oil Company, with reference to the rendition of their property for taxes in 1947, and that attached to the letter was a rendition for the Barnsdall assessment (R. 138-139). The letter was introduced in evidence as Defendants' Exhibit No. 1 on a letterhead of Barnsdall Oil Company, Petroleum Building, Tulsa, Oklahoma (R. 55).

As will be seen from the exhibit, it merely refers to the rendition of taxable property of Barnsdall Oil Company in Bowie County, Texas, and is signed "Chas. Gillespie, Tax Commissioner." Among the properties rendered in

the rendition attached to the letter was property identified as D-11, 407, styled "Louis Heilbron Lease, 97 Acres in M. H. Janes Headright Survey, Equipment and Well," which was rendered at $1,500.00. Also rendered under the same property number was "Daily ave. gross production on Jan. 1, 1947—41.3 bbls. Daily ave. Barnsdall Int. 65.625 on Jan. 1, 1947—27.1 bbls. @ $200.00" (R. 57).

The evidence further established that at the time Mr. Gillespie appeared in the office of the Tax Assessor and Collector, that the pencil notations which appeared on the rendition sheet of Barnsdall Oil Company were not on that instrument at the time it was received in the office of the Tax Collector, but that the pencil notations were made by Gillespie while in the Tax Assessor's office, and that after Gillespie had made the pencil notations on the rendition sheet, he wrote opposite the figure 21.875 the words "Willis Overriding," thereby showing the pro rata part Willis should be assessed, and after Gillespie's calculations that Barnsdall should be assessed only 65.625, that the assessments were made on the tax books against Barnsdall Oil Company, and as a result of Gillespie's calculations, assessment was also made against petitioner, A. L. Willis, for the one-fourth of seven-eighths overriding interest (R. 141-143). The evidence further established that at the time Gillespie called upon the Tax Col-

lector of Bowie County, Texas, he made pencil notations on the rendition sheet as follows: "12.5"—after which Gillespie wrote "Roy" (referring to royalty); "21.875," after which Gillespie wrote "O.R." (referring to Override), and then the balance of 65.625, all of which interests added together, Gillespie wrote the figures "100," accounting for all of the interests in the well as the same stood on the date of said rendition (R. 57). The evidence further established that after the assessments were made upon Gillespie's calculations, that the taxes were paid by the respective parties upon the basis of those assessments (R. 143).

ARGUMENT

The honorable trial Judge of the United States District Court for the Eastern District of Texas wrote an opinion in support of his judgment, reported in 78 Fed. Supp. 293. Although the question of ratification presented by the foregoing application was also presented in the trial of this cause, as is seen from the District Judge's opinion, it was not passed upon, alluded to nor mentioned in said opinion. The only question presented to the Fifth Circuit Court of Appeals in this cause was the question of ratification and waiver. The Fifth Circuit Court of Appeals affirmed the judgment of the District Court, stating such affirmance was made "for the reasons set out by the District Judge in his opinion reported in 78

Fed. Supp. 293." Petitioners herein have been unable to have either the District Court or the Fifth Circuit Court of Appeals to write upon the question presented by the foregoing application.

Even though the trial court found that the petitioner, A. L. Willis, obtained confidential information through his special agencies with the respondents, and used the same to the detriment of respondents in purchasing the Heilbron lease, the petitioners submit that the respondents, by their conduct and actions, after discovering the alleged fraud or breach of trust on the part of the petitioner, A. L. Willis, and with full knowledge of the alleged fraud and breach of trust, ratified, waived and condoned such fraud and breach of trust, and their cause of action predicated upon the same. The general rule regarding waiver or ratification by a cestui que trust, is found in *65 Corpus Juris,* page 955:

> "A cestui que trust, or one claiming to be such, who is competent to act for himself, may be estopped, or waive his right, to enforce a trust in his favor by words or acts on his part which, expressly or by implication, show an intention to abandon, or not to rely upon or assert, such trust, as by acquiescing, with knowledge of all the material facts, in the alleged trustee's acts in dealing with, or disposing of, the property in a manner inconsistent with the existence or continuation of a trust."

This general rule is brought closer to the instant case

in our Texas decisions, which announce the general rule as found in *42 Texas Jurisprudence*, page 773, as follows:

> "Waiver of the fraud or other wrong out of which a constructive trust would otherwise arise destroys the right of the aggrieved person to have the person who committed the fraud declared a trustee and to invoke consequential remedies."

Logical inquiry would then follow, what actions or conduct is necessary to constitute a waiver or ratification of fraud in case of a trust?

The Supreme Court of Texas, in the case of *Wright vs. Wright*, 132 S.W. (2d) 847, answers this question in the following language:

> "The reason of the rule seems to be that under a resulting trust, the interest of the beneficiary is primarily the possession of a right of action against the trustee *which may be waived or lost in the same manner as any other cause of action.*" (Emphasis supplied.)

The undisputed evidence in this case establishes that the alleged fraud or misconduct of the petitioner, A. L. Willis, was discovered by the respondents on December 5th or 7th, 1943, and that at that time, they became possessed of full knowledge of all of the facts which respondents claim constituted fraud and breach of trust on the part of the petitioner, A. L. Willis. The respondents thereafter, on the 13th day of December, 1943, instituted the instant suit against the petitioner, A. L. Willis, and

others, specifically alleging the acts which respondents claim to have constituted fraud and breach of trust. At the time of the discovery of the alleged fraud and breach of trust, and at the time of the institution of the suit, the respondents were then in the process of drilling a well upon the disputed Heilbron lease. However, after this well was abandoned as a dry hole, the respondents began their preparation, and sometime later began the drilling of a second well upon the Heilbron lease. At the time the respondents began their preparation, and the actual drilling of the second well, they had full knowledge of the alleged acts of fraud and breach of trust on the part of the petitioner, A. L. Willis, and had even instituted this suit, based upon the alleged acts of fraud and breach of trust. At no time after discovering the alleged fraud or breach of trust upon the part of the petitioner, A. L. Willis, did the respondents tender the assignment of the lease back to him, nor seek a refund of the $7,500.00 in cash, even though the respondents were still in control of the producing well on the Heilbron lease, and were enjoying the benefits of such producing well. The explanation that respondents could not tender the lease back at the time they discovered the alleged fraud or breach of trust on the part of the petitioner, A. L. Willis, because they were then in the process of drilling, will not suffice for the period of time after the first well was abandoned as a dry hole, and before respondents began the drilling of the

second well. Instead of rescinding the contract, tendering back the lease and demanding a refund of the $7,500.00 consideration, the respondents chose to keep the lease, benefit and profit by it, with full knowledge of all the facts, and treat the assignment contract as valid. We submit that such actions on the part of the respondents, after discovery of the alleged fraud, and with full knowledge thereof, condoned the alleged fraudulent actions and conduct of the petitioner, A. L. Willis, and should be construed as acquiescing in the lease contract and ratifying the same, and that in so condoning such fraudulent actions on the part of the petitioner, A. L. Willis, the respondents ratified such fraud and waived any cause of action which might be based upon the same.

We further submit that should such actions on the part of respondents, after discovery of the alleged fraud, not be sufficient, as a matter of law, to constitute ratification of the fraud and waiver of the cause of action, that certainly, when taken into consideration with other actions and conduct on the part of the respondents, after discovering the fraud, would, as a matter of law, constitute ratification of the alleged fraud on the part of the respondents, and waiver of the cause of action, such other conduct of the respondents being with reference to the action of their tax commissioner in assessing the Barnsdall Oil Company's properties in Bowie County, Texas.

In this connection, we find the evidence undisputed to the effect that the tax commissioner of Barnsdall Oil Company, in rendering the properties of Barnsdall Oil Company for taxation in Bowie County, Texas, only rendered an interest in the Heilbron lease of 65.625, being the interest that Barnsdall Oil Company would have had in said lease under the assignment contract made with the petitioner, A. L. Willis. In explaining why they were not rendering the entire interest of 87.5, Barnsdall Oil Company, through its tax commissioner, acknowledged that the petitioner, A. L. Willis, owned the other 21.875 interest, the same being the overriding interest reserved to petitioner, A. L. Willis, by the assignment contract. The respondent, Barnsdall Oil Company, acknowledged, by the conduct of its tax commissioner, that the petitioner, A. L. Willis, owned the one-fourth of seven-eighths override. If, in fact, the petitioner, A. L. Willis, did own such one-fourth of seven-eighths override, the only source of such ownership was the assignment contract. If, as respondents contend in this case, petitioner, A. L. Willis, and others, were acting as agents for respondents when they purchased the Heilbron lease, and that in reality the respondents were the owners of the Heilbron lease, then it would have been the duty of respondents to have rendered the entire 87.5 interest in the Heilbron lease, but in rendering only 65.625 interest of the Heilbron lease and specifically stating that the other 21.875 interest

was owned by the petitioner, A. L. Willis, we submit that the respondents herein certainly ratified the assignment contract, and evidenced their intention to stand upon said contract, thereby ratifying all fraud or breach of trust, of which they had full knowledge, on the part of the petitioner, A. L. Willis.

The case of *Rosenbaum, et al., vs. Texas Building and Mortgage Company, et al.*, 167 S.W. (2d) 506, by the Supreme Court of Texas, is very closely in point with the instant case, so far as ratification and waiver are concerned. The facts, briefly summarized, are as follows:

The plaintiff instituted suit to rescind the contract theretofore entered into between plaintiff and the defendant on the ground that the same was induced by fraud. The contract was for the sale by defendant of certain stocks and bonds of the defendant. The plaintiff discovered the falsity of the reputations made to her on June 13, 1938, and filed her suit on September 8, 1938. On July 21, 1938, after she had discovered the fraud, but before she had instituted the suit, she received from the defendant a check for $150.00, which was a semi-annual payment on the bonds purchased by her. She cashed the same, and appropriated the proceeds thereof to her own use. The Supreme Court of Texas, passing upon these facts, stated:

"That unquestionably was a positive act of ratification of the contract."

The record further reflects that after the suit was instituted, the plaintiffs sought and procured a series of orders in the nature of injunctions against the respondents, in which action it was necessary for her to appear as a stockholder of the defendant company. The Court further stated:

"The principle of law applicable to the foregoing facts is well established. It is, in effect, that, if a person who is induced by fraud to enter into a contract continues to receive benefits under the contract after he becomes aware of the fraud, or if he otherwise conducts himself in such manner as to recognize the contract as subsisting and binding, he thereby affirms the contract and waives his right of rescission. An express ratification is not necessary; any act based upon a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission.

"By accepting and appropriating the $150.00 paid to her as interest on the bonds with full knowledge of the facts upon which she bases her cause of action for fraud, and later by procuring relief to which she would not have been entitled but for her allegation under the oath of her attorney that she was a stockholder in the respondent corporation, the petitioner clearly waived her right to have the contract rescinded."

In the instant case, an express ratification on the part of respondents was not necessary, and we submit that the actions of the respondents, with full knowledge of the

alleged fraud and breach of trust, in drilling a second well upon the Heilbron lease, and in acknowledging the ownership of the petitioner, A. L. Willis, to the one-fourth of seven-eighths overriding interest, and in escaping tax liability, committed actions based upon a recognition of the contract as subsisting, and that such actions were inconsistent with an intention of avoiding the contract.

The substance of all of the above evidence is that on April 30, 1947, the Tax Commissioner for the Barnsdall Oil Company rendered the Barnsdall properties in Bowie County for taxation, and on that date rendered an interest of 65.625, and subsequently appeared in person and explained to the Tax Collector, by his conduct and actions, that the reason they were not rendering full valuation, which would be 87.5, was because A. L. Willis owned a one-fourth of the seven-eighths override, and that 21.875 should be assessed against the said A. L. Willis. Mr. McDuffie accordingly assessed Barnsdall the interest of 65.625, and Willis the interest of 21.875, and both parties paid these taxes upon this basis.

If Barnsdall had been paying the taxes on the entire working interest, it would be on a valuation based on the whole seven-eighths interest, which would be 87.5. By their conduct, acting through their Tax Commissioner, they recognized the interest of Willis, and had their valuation reduced, thereby saving Barnsdall money in the

payment of their taxes, and by the same conduct, caused the said A. L. Willis to pay taxes upon said well and equipment.

We earnestly submit to this Honorable Court that the actions of Barnsdall in this respect are tantamount to a waiver of any cause of action they might have, and also a waiver and ratification of any acts or conduct on the part of the respondents which are alleged to be fraud and a breach of trust, and upon which they seek to establish and impress the constructive trust.

In determining whether or not the acts and conduct on the part of Barnsdall constitute a waiver and ratification, we invite the Court's attention to the case of *Cator vs. Commonwealth Bonding & Casualty Insurance Company*, 216 S.W. 140, decided by the Commission of Appeals, which opinion is adopted by the Supreme Court of Texas, and entered as a judgment of the Supreme Court, in which the facts were substantially as follows:

Plaintiff, Cator, entered into a written contract of subscription to the capital stock of the Commonwealth Bonding and Casualty Insurance Company, a corporation in process of organization. The contract provided that the corporation would be organized under the laws of Texas, with an authorized capital stock of $300,000, and a paid-up capital of at least $200,000, free from organization ex-

penses. The plaintiff agreed to pay for his 125 shares of stock the sum of $5,000, $4,375 to be paid in money or securities, and $625.00 to be paid concurrently with the execution of the contract. Thereafter, plaintiff executed to the Commonwealth Company his note in the sum of $4,375.00 and a deed of trust to certain lands in Hansford County to secure the same. The corporation was organized under the laws of Arizona, and the paid-up capital stock did not exceed the sum of $16,000. The plaintiff claimed fraud and fraudulent misrepresentations on the part of the Organization Company. The defendant corporation answered that the plaintiff had participated by proxy in a meeting of the stockholders, in which it was determined that incorporation should be under the laws of Arizona, and after the plaintiff had knowledge that the corporation had been so organized, he transferred his certificates of stock to the Bankers' Guaranty Company, and thereby ratified and waived any fraud, and therefore was not entitled to cancellation of the contract. The Bankers' Guaranty Company filed its answer and admitted that plaintiff in error had transferred to it his certificate of stock; that it was then, and had been at all times, ready to surrender the stock and disclaimed any interest therein. The Supreme Court, in passing upon the question of ratification, stated:

"We concur in the holding of the Court of Civil

> Appeals that, while the organization of the corporation under the laws of Arizona, instead of under the laws of the State of Texas, as provided in the contract, was, under the evidence, a departure from the terms of the contract, sufficient to warrant cancellation, the transfer of his stock by plaintiff in error, after he had acquired knowledge of such departure, was a waiver of the right of cancellation on this ground."

We submit that the conduct and acts of the respondent, Barnsdall Oil Company, in the instant case, were much stronger acts of waiver and ratification than that of the plaintiff, Cator, in the case hereinabove cited. There is no evidence whatsoever that Cator received any consideration for the transfer of his stock. In fact, the answer shows that it was a mere accommodation matter when he transferred said stock to the Bankers' Guaranty Company. In the instant case, however, Barnsdall recognized the interest that the petitioner, A. L. Willis, owned in said well, the same being one-fourth of the seven-eighth override and not only recognized this interest, but at their insistence lowered their own interest for the purpose of taxation, and benefitted financially by such arrangements. There can be no question in this case but that Barnsdall acted with full knowledge of all of the circumstances in the case, and at the time of their waiver and ratification, were fully aware of all of the acts they alleged constituted fraud and breach of trust. The actions of Barnsdall relative to the tax matter took place in April, 1947, and the evidence

is undisputed that they were aware of the alleged acts of fraud, and breach of trust on the part of A. L. Willis.

In the case of *Couch v. Sparger* (Court of Civil Appeals at San Antonio), 252 S. W. 817, the facts were substantially as follows:

John Couch was the first husband of plaintiff's mother, Elizabeth Couch Sparger, and at the death of John Couch, he was seized and possessed of 199 acres of land in Georgia, which plaintiff claims descended to him and to his brother, S. C. Couch, and sister, Mary Couch. After the death of his father, his mother, Elizabeth Couch, married Thomas Sparger; that they sold the Georgia property belonging to John Couch, and the proceeds were by them invested in the lands in controversy. Plaintiffs claim that there was an agreement between the said Thomas Sparger and Elizabeth Couch Sparger that the proceeds of the Georgia lands were invested in lands in Tarrant County, the legal title being taken in the name of Thomas Sparger, with the understanding and agreement that at the death of Elizabeth and Thomas Sparger, he should have the Tarrant County land. Thereafter, the Tarrant County land was sold by Thomas and Elizabeth Sparger and the proceeds invested in the Erath county lands under the same trust agreement. Thomas Sparger and Elizabeth Sparger had several children who were defendants in this case, and upon the death of Thomas Sparger, the plaintiff brought

this action to impress the parol trust. The facts are not clear, but it appears, and the Court so states, that after the plaintiff became aware of the claims of the defendant, that the lands in controversy were leased and that the plaintiff accepted as his portion of said lease bonus money a one-fourteenth interest, which is the exact interest that the defendants claimed he owned in the property, and permitted the sum of $1,000.00 to be paid to the others representing their interest as claimed by the defendants. In passing upon the question of ratification and waiver, the Court had this to say:

> "We think the facts justify the conclusion that appellant with the full facts before him in accepting in full settlement a one-fourteenth interest of the bonus money as his share due under the oil and gas lease, and permitting, without question, the act of the attorney in fact to pay the sum of $1,000.00 of said bonus having full knowledge of all the facts, constituted a waiver of any claim to a greater right and interest than an undivided one-fourteenth, that he inherited from his mother, and thereby further estopped from claiming an express parol trust in the whole in his favor."

In the *Couch case,* the appellant was contending for the entire interest, and the defendants were contending that he only had an undivided one-fourteenth interest, the appellants' claim to the entirety being based upon an alleged trust. However, with all of the facts before him, he accepted, not a one-fourteenth interest in the land he was

claiming, but a one-fourteenth interest in the lease money, and the Court was very emphatic in holding that this waived his claim to the land in the entirety.

In this connection, we submit that Barnsdall not only accepted, but was the instigator of a matter which recognized a lesser interest in the land than it claims in this case, which waiver and ratification not only took place when they had full knowledge of the facts, but after a suit had been filed, based upon the facts of which they did have knowledge.

In the case of *Southwestern Surety Insurance Company v. Ferguson*, 131 S. W. 662, the Court states the correct rule that should be applied to the instant case, in the following language:

> "Furthermore, the petition shows that long after the alleged deceit and fraud had been perpetrated, and after the first payment made by him and the execution of the note for the remainder of the purchase price of the 250 shares of stock, he executed a renewal note, and the petition fails to show when he first acquired knowledge of the alleged fraud. *If at the time of its execution he had knowledge of the facts now relied on for a rescission, his conduct in executing the renewal note must be treated as a reaffirmation of the original contract, and a waiver of any right to rescind.*" (Emphasis supplied.)

We submit that the actions of the respondent herein, Barnsdall Oil Company, clearly show, as a matter of law, their intention to stand on the assignment contract made

with petitioner, A. L. Willis, and to treat the same as valid and subsisting.

In the case of *Evans vs. Grogan,* 23 S.W. 854, it was said:

> "Fraud may be ratified and remedies against it may be lost by acquiescence; that is, as is said by Pomeroy, by some act, not deliberately intended to ratify, but recognizing the transaction as existing, and intended in some extent at least to carry it into effect, and to obtain or claim the benefits from it."

In the instant case, Barnsdall Oil Company, and the other respondents, are attempting, in effect, to repudiate their contract with the petitioner, A. L. Willis, but while in the process of repudiating the same, they at the same time treat the contract as valid, claiming benefits thereunder, actually reducing their taxable valuations, and benefitting themselves financially. At the same time they are seeking to repudiate the contract, they acknowledge the ownership of the petitioner, A. L. Willis, to the one-fourth of seven-eighths overriding interest.

In the case of *Duckels vs. Dougherty,* 226 S.W. 720, the Court stated:

> "The facts and circumstances do unquestionably and conclusively show that long after Nellie fully understood and appreciated all the details of her transaction with Neil, she collected interest due on the $15,000.00 note given in part payment for the land conveyed to her, and even after her marriage

and after she filed this suit she sought benefits under the contract which she now, by this suit, seeks to rescind; and that by accepting such benefits she ratified the contract, and cannot now repudiate the same and avoid its provisions."

We feel that this entire argument may be summarized in that part of the Court's opinion found in the case of *Kingman and Company vs. Stoddard, et al.*, 85 Fed. 745, stated as follows:

> "The defrauded party, with knowledge of the deceit practiced upon him, may not play fast and loose. He cannot approbate and reprobate. He must deal with the contract and with the wrongdoer at arm's length. He may not, with knowledge of the fraud, speculate upon the advantage of the contract, receiving its benefits, and at the same time repudiate its obligations."

CONCLUSION

The respondents, with full knowledge of the alleged fraudulent acts and breach of trust on the part of the petitioner, A. L. Willis, performed and committed acts which ratified the alleged fraud and breach of trust, and thereby waived their cause of action.

We believe the petition should be granted and the case reversed.

Respectfully submitted,

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